Supreme Court, U.S.
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No. 00-578

IN THE

Supreme Court of the United States

H. PRICE JESSUP, *et al.*,

Petitioners,

v.

THE AMERICAN KENNEL CLUB, INC.
and LABRADOR RETRIEVER CLUB, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether two separate and distinct not-for-profit private standard setting associations, one responsible for preparing and recommending, and the other for reviewing and adopting a standard, acting independently and pursuant to their respective Constitutions in promulgating a facially neutral standard, constitute a "*per se* conspiracy" in violation of the Sherman Act?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents The American Kennel Club, Inc. and the Labrador Retriever Club, Inc. respectively certify that neither has a parent company, and no publicly held company owns 10% or more of the stock of either Respondent.

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INTRODUCTION

Petitioners, a minority faction of Labrador Retriever dog enthusiasts, seek review of the Second Circuit decision affirming the District Court's order dismissing the allegations that the Labrador Retriever Club, Inc. (the "LRC") and The American Kennel Club, Inc. (the "AKC") conspired with competitors of Petitioners in violation of the Sherman Act to amend the official breed standard for purebred Labrador Retrievers.[1] The Second Circuit affirmed the District Court's conclusion that, *inter alia*, the record was devoid of any evidence of an anti-competitive conspiracy among the LRC, the AKC and Petitioners' competitors.

The Second Circuit ruling is not in conflict with either this Court's decision in *Allied Tube v. Indian Head*, or the decisions of other Circuit Courts. The Second Circuit correctly construed this Court's precedents in affirming the District Court's order and the case has no far-reaching antitrust implications. In short, Petitioners have attempted to make a "federal case" out of what is, and always has been, nothing more than a quarrel over the characteristics of the "ideal" Labrador Retriever. The Second Circuit ruling was proper in all respects and this Court should deny the Petition for a Writ of Certiorari.

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1. The Second Circuit decision appended to the Petition is misstated. *See* Pet. App. at 1. A true copy of that ruling is annexed hereto as an Appendix. The per curiam decision affirmed the District Court's judgment "substantially for the reasons stated in [the District Court's] opinion." App. at 2a. Accordingly, the District Court's opinion will be treated as the *ratio decidendi* of the Second Circuit.

STATEMENT OF THE CASE

Each year more than 10,000 competitive events are held under the auspices of the AKC. The most well-known of these events are purebred dog shows, in which competing dogs are judged on their physical conformation to a breed standard. The cornerstone of that competition is the written standard of a breed — a description of the ideal appearance and temperament of the breed intended to foster and promote the breed, set the ideal type of the breed to which breeders strive and serve as a guide for those judging the breed. Petitioners, a small group of Labrador Retriever enthusiasts, challenge the authority of the AKC (and its member clubs, including the LRC) to adopt and amend facially neutral standards that govern competition in the sport of purebred dogs, suggesting — erroneously — that private standard setting organizations must be treated as "*per se* conspiracies" violative of the Sherman Act.

The crux of the dispute is the provision in the 1994 amended Labrador Retriever breed standard (the "1994 Standard") that disqualifies a dog from a conformation show if it measures outside of the long-established breed height standard. For more than a half-century, the breed standard for the Labrador Retriever has had a recommended height range. The 1994 Standard retained this height range, but added a height disqualification; a provision, not unusual in purebred dog standards, that a dog measuring outside of the prescribed height range is disqualified from competing in a conformation dog show.

The AKC is a New York not-for-profit membership corporation state-chartered for the protection and advancement of purebred dogs, including the adoption and

enforcement of rules regulating and governing competitive dog shows. Membership in the AKC consists of more than 500 dog clubs from across the country. The AKC does not engage in the breeding, selling or showing of Labrador Retrievers. The bulk of its revenues are generated from registration fees and entries at AKC dog shows and performance events. (Pet. App. at 5)

The AKC registers more than 145 breeds of purebred dogs, each of which has a breed standard. The majority of the registered breeds have a parent breed club that is responsible for promoting and advancing its breed, including defining the breed's conformation standard. (Pet. App. at 6)

The LRC is a New York not-for-profit corporation, the parent breed club for the Labrador Retriever, and a member club of the AKC. The LRC's purposes parallel those of the AKC — to promote and advance the interests of the Labrador Retriever breed. At the time this lawsuit was commenced, the LRC had approximately 750 Labrador enthusiasts from across the country as members. The LRC does not engage in the selling, breeding or showing of Labrador Retrievers. (Pet. App. at 6)

The AKC's Constitution provides that each parent breed club has the responsibility to define or amend the standard of its breed. No standard or revision to a standard becomes effective for use in AKC events until it is approved by the AKC's Board of Directors. (Pet. App. at 6)

The LRC, as the parent club for the Labrador Retriever breed, is responsible for defining the breed standard for Labrador Retrievers. The LRC's Constitution provides that amendments to the breed standard must be approved

by the members of the LRC and thereafter become effective upon approval by the Board of Directors of the AKC. (Pet. App. at 6)

Prior to the adoption of the 1994 Standard, the conformation of the Labrador Retriever was governed by a breed standard that had been promulgated in 1957 (the "1957 Standard"). That standard provided that, *inter alia*, adult male Labrador Retrievers were to be 22 1/2 to 24 1/2 inches tall at the shoulder, and adult females 21 1/2 to 23 1/2 inches tall. (Pet. App. at 7)

Beginning in 1987, the AKC undertook a major program to conform all breed standards to a standardized format for order and content, using standardized terminology. (Pet. App. at 7-8) In connection with that program, the LRC undertook to review and revise the Labrador Retriever breed standard. This process resulted in more than four years of often contentious debate within both the LRC and the larger community of Labrador Retriever owners over the ideal characteristics of the Labrador Retriever. Over the course of this process, the LRC membership three times voted on and approved proposed revised breed standards. Twice, proposed revised breed standards were submitted to the AKC for Board consideration, only to be returned to the LRC for further debate following Petitioners' (and others) urging that the standard needed further re-tooling. (Pet. App. at 8-9)

Ultimately, a final proposed revised standard, retaining the fifty year old height standard, but providing that adult dogs measuring more than one-half inch outside that range would be disqualified from conformation shows, was approved by more than two-thirds of the LRC members voting, submitted to the AKC, and adopted by the AKC

Board of Directors by a ten to one vote. (Pet. App. at 8-9) That standard, the 1994 Standard, became effective March 31, 1994 and has been in place since that time. (Pet. App. at 9)

Shortly after the 1994 Standard became effective, Petitioners filed a putative class action complaint alleging that, *inter alia*, the AKC and LRC had conspired in violation of the Sherman Act with Petitioners' competitors in connection with the recommendation and adoption of the 1994 Standard. After the close of discovery, the District Court granted the summary judgment motion of the AKC and LRC, dismissing the antitrust claims on the basis that there was no evidence of any anti-competitive conspiracy.[2]

The Second Circuit affirmed the District Court's opinion "substantially for the reasons stated in [the District Court's] opinion" (App. at 2a), and subsequently denied Petitioners' petition for panel rehearing and rehearing *en banc*. (Pet. App. at 2-3)

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2. Contrary to Petitioners' suggestion (Pet. at 5), Respondents raised significant issues of fact with respect to nearly every allegation made below by Petitioners, including the relevant market definition, the existence of a cognizable antitrust injury, and the effect of the 1994 Standard on the breeding, registration and showing of Labrador Retrievers.

REASONS FOR DENYING THE WRIT

I.

THE SECOND CIRCUIT RULING DOES NOT CONFLICT WITH EITHER *ALLIED TUBE v. INDIAN HEAD* OR THE DECISIONS OF OTHER CIRCUIT COURTS

A. The Second Circuit Ruling Does Not Conflict With This Court's Decision In *Allied Tube v. Indian Head*

In a transparent attempt to grab this Court's attention, Petitioners argue that the Second Circuit ruling is irreconcilable with this Court's ruling in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S. Ct. 1931 (1988). (Pet. at 6-9, 10-11) Their contention is meritless.

Allied Tube involved the National Fire Protection Association ("NFPA"), promulgator of product standards and codes related to fire protection, and its National Electrical Code ("Code"), which established requirements for the design and installation of electrical wiring systems, and which was routinely adopted into law by a substantial number of state and local governments. The Code permitted the use of electrical conduit made of steel, and plaintiff, a manufacturer of plastic conduit, proposed to the NFPA to extend the Code to plastic conduit as well. 486 U.S. at 495-96, 108 S. Ct. at 1934-35. Defendant, a steel conduit manufacturer, and potential competitor of plaintiff, conceded that it conspired with other steel conduit manufacturers to defeat plaintiff's proposal by packing the NFPA meeting at which plaintiff's proposal was considered with new NFPA members for the sole purpose of voting against plaintiff's

proposal, and likewise acknowledged that it had a pecuniary interest in preventing plaintiff from competing in the conduit market. 486 U.S. at 497, 108 S. Ct. at 1935. Defendant argued that its conduct nonetheless was proper because it had antitrust immunity under *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523 (1961), which affords immunity from the antitrust laws to parties lobbying the government to restrain trade. 486 U.S. at 499-500, 108 S. Ct. at 1936-37.

Petitioners grossly misstate this Court's holding in *Allied Tube*. They suggest that *Allied Tube* "establishes a *per se* assumption of Sherman Act conspiracy by standard-setting associations engaged in standard-setting." (Pet. at 9) To the contrary, this Court in *Allied Tube* did not find that the NFPA was a continuing conspiracy of its members, and, in fact, expressly declined to set out rules regarding antitrust liability governing private standard processes, finding only that, under the circumstances surrounding the NFPA's adoption of the Code, the NFPA did not have *Noerr* immunity from the Sherman Act. 486 U.S. at 509-510, 108 S. Ct. at 1942.

While *Allied Tube* states that trade associations are inherently conspiratorial, it does not support treating them as continuing conspiracies of its members, much less treating them as "*per se* conspiracies" under the Sherman Act. Nowhere did this Court in *Allied Tube* suggest any *per se* analysis of a standard setting organization; notably, the Court recognized that most lower courts apply a rule of reason analysis to standard setting by private organizations.[3]

3. Petitioners suggest that this Court's failure to cite to *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, (Cont'd)

486 U.S. at 501, 108 S. Ct. at 1937. Nowhere in *Allied Tube* (or any other decision) did this Court consider or suggest that the standard of proof in proving a conspiracy within a trade association (or, as the case here, between two separate trade associations) was different than that set out in its decisions in *Matsushita* and *Monsanto*.

Petitioners contend that this Court has recognized and presumes that standard setting organizations are *per se* antitrust conspiracies. (Pet. at 9, 13) To the contrary, it is beyond cavil that sporting associations may promulgate facially neutral standards and rules to effectuate the purposes for which they were formed — to wit, to promote the integrity of and govern its sport. As this Court observed in *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Oklahoma*:

> What the NCAA and its member institutions market in this case is competition itself -contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed.

(Cont'd)

106 S. Ct. 1348 (1986) and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S. Ct. 1464 (1984) in *Allied Tube* is evidence that it implicitly rejected the application of those cases in the context of evaluating the conduct of a standard setting association. (Pet. at 11-13, 16) That contention is meritless. The issue presented in *Allied Tube* was whether conduct, conceded by defendants to be an anti-competitive conspiracy, was nonetheless immune from antitrust liability under the *Noerr* doctrine. This Court did not need to consider whether defendants' conduct gave rise to an *inference* of a conspiracy under *Monsanto* and *Matsushita* — the conspiracy was acknowledged.

> A myriad of rules affecting such matters as the size of field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete.

468 U.S. 85, 101, 104 S. Ct. 2948, 2960 (1984).

Concluding that "restraints on competition are essential if the product is to be available at all," this Court in *NCAA* rejected a *per se* approach and applied a rule of reason analysis. 468 U.S. at 101, 104 S. Ct. at 2960. Numerous federal courts have similarly rejected a *per se* approach in reviewing challenges to rules and standards of sporting associations. *See, e.g., Brenner v. World Boxing Council*, 675 F.2d 445, 454-55 (2d Cir.), *cert. denied*, 459 U.S. 835, 103 S. Ct. 79 (1982) (rules promulgated by sporting organization not subject to *per se* analysis); *Hatley v. American Quarterhorse Ass'n*, 552 F.2d 646, 653-54 (5th Cir. 1977) (applying rule of reason to standard for purebred horses set by sanctioning organization); *United States Trotting Ass'n v. Chicago Downs Ass'n, Inc.*, 665 F.2d 781, 787 (7th Cir. 1981) (*en banc*) (reviewing rules of the United States Trotting Association under rule of reason).

This Court's decision in *Allied Tube* neither established, nor supports, that standard setting associations are *per se* violations of the Sherman Act. Accordingly, the Second Circuit ruling in no way conflicts with the holding in *Allied Tube*.

B. The Second Circuit Ruling Does Not Conflict With The Decisions Of Other Circuit Courts

In addition to suggesting that the Second Circuit ruling is irreconcilable with this Court's decision in *Allied Tube*, Petitioners contend that the ruling, together with a decision in the Seventh Circuit,[4] "squarely conflict" with decisions in the Third Circuit (*Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996 (3d Cir. 1994), *cert. denied*, 514 U.S. 1063, 115 S. Ct. 1690 (1995)); Eighth Circuit (*National Ass'n of Review Appraisers & Mortgage Underwriters, Inc. v. Appraisal Foundation*, 64 F.3d 1130 (8th Cir. 1995), *cert. denied*, 517 U.S. 1189, 116 S. Ct. 1676 (1996)); First Circuit (*Clamp-All Corp. v. Cast Iron Soil Pipe Instit.*, 851 F.2d 478 (1st Cir. 1988), *cert. denied*, 488 U.S. 1007, 109 S. Ct. 789 (1989)); and Fifth Circuit (*Consolidated Metal Products, Inc. v. American Petroleum Inst.*, 846 F.2d 284 (5th Cir. 1988)). (Pet. at 5-6, 10) There is no conflict. Petitioners disingenuously mischaracterize the holdings from the decisions of the First, Third, Fifth and Eighth Circuits in an effort to create an issue worthy of writ consideration.

Petitioners suggest that those Circuits have "embraced" the theory that trade associations are continuing conspiracies, and thus *per se* conspiracies under the Sherman Act. (Pet. at 10) To the contrary, to the extent the cited cases even consider the question — and only two of the four do — they squarely reject Petitioners' contention.

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4. *See Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391 (7th Cir. 1993), *cert. denied*, 510 U.S. 111, 114 S. Ct. 1054 (1994).

The Fifth Circuit in *Consolidated Metal Products*, far from supporting Petitioners' theory, expressly rejected the notion that a trade association is a continuing conspiracy of its members and evaluated allegations of a conspiracy against a trade association under *Matsushita*:

> A trade association by its nature involves collective action by competitors. Nonetheless, a trade association is not by its nature a "walking conspiracy", its every denial of some benefit amounting to an unreasonable restraint of trade. [footnote omitted] In particular, it has long been recognized that the establishment and monitoring of trade standards is a legitimate and beneficial function of trade associations.
>
> To survive summary judgment on the issue of conspiracy, the plaintiff must present evidence that tends to exclude both the possibility of conduct consistent with permissible competition and the possibility that the alleged conspirators acted independently. [citing *Matsushita*]

846 F.2d at 293-94.

Similarly, in *Clamp-All*, the First Circuit considered and rejected the argument that standard setting associations act as a *per se* conspiracy in setting product standards:

> Appellants seem to say that CIS-PI's very promulgation of this standard and its efforts to secure its adoption by certifying authorities amounts to an unreasonable restraint of trade. We do not see how that can be so. . . .

> There could be special circumstances, showing, in an individual case, that the standard setting at issue serves no legitimate purpose, or that it is unnecessarily harmful. [citation omitted] But the plaintiff would have to show the existence of such circumstances. . . .

851 F.2d at 487.

The Third Circuit, in *Alvord-Polk*, did not expressly reject the theory that trade associations are a continuing conspiracy, but perhaps only because the issue was not before it. The issue in *Alvord-Polk* was whether antitrust liability of a trade association may be established by the apparent authority of an agent to speak on its behalf. 37 F.3d at 1009. In that respect, in a footnote, the Third Circuit noted "[t]here is, however, authority for the proposition that a trade association, in and of itself, is a unit of joint action sufficient to constitute a section 1 combination." 37 F.3d at 1009 n.11. In support of that statement, the Court cited three secondary sources. Among those sources was a law journal article with a parenthetical which Petitioners now erroneously cite as the holding of the case and the law of the Third Circuit: that "[b]ecause trade associations are, by definition, organizations of competitors, they automatically satisfy the combination requirements of § 1 of the Sherman Act." *Compare id. with* Pet. at 6.

Even more irrelevant to Petitioners' theory is the Eighth Circuit decision in *Review Appraisers*. That decision did not even address the status of trade associations or the treatment of standard setting under the Sherman Act. Instead, the Eighth Circuit in *Review Appraisers* rejected the plaintiff's contention that its exclusion from a professional organization

constituted a *per se* group boycott. 64 F.3d at 1133. Incredibly, the parenthetical attributed by Petitioners to *Review Appraisers* is entirely unrelated to the holding in that case. Rather, it is the verbatim parenthetical describing the holding in *Allied Tube* cited in the *Review Appraisers* decision. *Compare id. with* Pet. at 6.

In sum, Petitioners' contention that the Second Circuit ruling conflicts with the decisions of First, Third, Fifth and Eighth Circuits, or that there is otherwise any split among the Circuits in this area, is wholly lacking of any merit.[5]

II.

THE SECOND CIRCUIT CORRECTLY CONSTRUED THIS COURT'S PRECEDENTS IN AFFIRMING THE DISTRICT COURT'S JUDGMENT

The Second Circuit's analysis of the standard for determining whether a triable issue of fact that an antitrust conspiracy existed was correct and squarely in line with this Court's decisions in *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986) and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S. Ct. 1464 (1984).

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5. Notably, this Court denied *certiorari* last year in a case analogous to the Second Circuit ruling. *See Super Sulky, Inc. v. United States Trotting Ass'n*, 174 F.3d 733 (6th Cir.), *cert. denied*, ___ U.S. ___, 120 S. Ct. 172 (1999). In that case, arising from a harness racing association's adoption of a new standard for sulkies which resulted in the banning of plaintiff manufacturer's sulky, the Sixth Circuit, relying on *Matsushita* and the same reasoning in the Second Circuit ruling, dismissed the allegations that the association conspired against plaintiff because plaintiff failed to meet its burden of showing that the evidence was more consistent with a conspiracy than with independent action. 174 F.3d at 738-39.

To survive a motion for summary judgment on a conspiracy claim under the Sherman Act, this Court has stated that there must be a threshold showing that a reasonable jury could find that the alleged conspirators made a " 'conscious commitment to a common scheme designed to achieve an unlawful objective' " and that there must be evidence that tends to exclude the possibility of independent action. *Monsanto*, 468 U.S. at 764, 104 S. Ct. at 1471.

Two years later in *Matsushita* this Court elaborated on its holding in *Monsanto*, confirming the heavy burden of proof in establishing a triable issue of an antitrust conspiracy. This Court stated that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case" and that plaintiffs "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [plaintiffs]." 475 U.S. at 588, 106 S. Ct. at 1356-57 (citation omitted). Thus, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment . . . a plaintiff . . . must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." 475 U.S. at 588, 106 S. Ct. at 1356. (citations omitted).

Moreover, the absence of a rational motive to engage in the alleged conspiracy is "highly relevant to whether a 'genuine issue for trial' exists within the meaning of Rule 56(e)." 475 U.S. at 596, 106 S. Ct. 1361. If the alleged conspirators had "no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." 475 U.S. at 596-97, 106 S. Ct. at 1361 (citation omitted).

Consonant with *Matsushita* and *Monsanto*, the Second Circuit held that in order to prove an antitrust conspiracy, plaintiffs must establish that the alleged conspirators had an "agreement . . . to accomplish a specific illegal objective, be it to restrain trade under § 1, or to monopolize or attempt to monopolize trade or commerce under § 2." (Pet. App. at 13) Moreover, where plaintiffs rely on circumstantial evidence of a conspiracy the Second Circuit properly concluded that

> if defendants can demonstrate that they had no rational economic motive to participate in an anti-competitive conspiracy, and that the conduct at issue is consistent with permissible activity under the antitrust laws, such conduct does not give rise to an inference of conspiracy unless plaintiffs come forward with evidence that tends to exclude permissible explanations for the conduct.

(Pet. App. at 14)

Contrary to Petitioners' contention (Pet. at 15, 16), the mere existence of an otherwise legitimate and permissible relationship between the AKC and LRC without some showing of concerted action to achieve an unlawful objective cannot support allegations of an antitrust conspiracy. In that respect, it is well-established that the recommendation and subsequent voluntary approval of, or compliance with, a recommendation cannot establish the requisite " 'conscious commitment to a common scheme designed to achieve an unlawful objective' " necessary to support an antitrust claim. *Monsanto*, 465 U.S. at 764, 104 S. Ct. at 1471 (citation omitted).

In *Monsanto*, a manufacturer, after receiving complaints from other distributors, terminated a distributor who had sold its products at a discount. Acknowledging that "[a] manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market[,]" this Court expressed reluctance to interfere with legitimate relationships between parties. *Monsanto*, 465 U.S. at 762, 104 S. Ct. at 1470.

The Second Circuit found that the conduct of the AKC and LRC was consistent with a perfectly legal and pro-competitive purpose — the setting of purebred dog standards, which is a major purpose of each organization. (Pet. App. at 14, 16) There is nothing alleged to have occurred outside the ordinary, permissible and reasonable course of conduct of the two standard setting organizations. Discovery failed to reveal any improper or inappropriate conduct. No credible evidence suggests that the two associations did not act independently. There was no evidence offered by Petitioners that the LRC or anyone else coerced, influenced or otherwise conspired with the AKC Board of Directors in connection with its adoption of the 1994 Standard. Indeed, the proposed standard was twice returned to the LRC from the AKC for further consideration in light of criticism about the standard from, *inter alia*, the Petitioners. (Pet. App. at 17) Moreover, the fact that the 1994 Standard was approved by more than two-thirds of the LRC membership, and subsequently authorized by the AKC Board of Directors by a ten to one vote, provided a safeguard against any anti-competitive animus in drafting the standard by any individuals. (Pet. App. at 17)

The Second Circuit correctly analyzed whether there was any evidence of a conspiracy between the LRC and AKC and Petitioners' competitors and correctly concluded there was not.[6]

III.

THIS CASE DOES NOT HAVE FAR-REACHING ANTITRUST IMPLICATIONS

In their conclusion, Petitioners suggest that the Second Circuit ruling immunizes standard setting associations from antitrust scrutiny. (Pet. at 17) In fact, this case has never been about antitrust concerns.

Petitioners' long-running complaint has always centered around a single issue — their disagreement with the 1994 Standard, not that it was the result of an anti-competitive conspiracy. After considering the relevant facts and applicable law, the Second Circuit properly held that

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6. The Second Circuit ruling was consistent with its precedent in the area. The Second Circuit has not treated trade associations differently than other organizations when evaluating claims of an antitrust conspiracy on summary judgment. *See AD/SAT v. Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999); *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc.*, 996 F.2d 537, 544-45 (2d Cir.), *cert. denied*, 510 U.S. 947, 1145 S. Ct. 388 (1993). In both *AD/SAT* and *Capital Imaging* it was alleged that trade associations and its members had entered into unlawful agreements under the Sherman Act. In both, the Second Circuit expressly relied on *Matsushita* and *Monsanto* in concluding that plaintiffs, to withstand a motion for summary judgment, must present evidence that casts doubts on the independent or proper conduct by the association and its members. *AD/SAT*, 181 F.3d at 233; *Capital Imaging*, 996 F.2d at 545.

Petitioners failed to raise any triable issue of fact as to whether the LRC and AKC conspired with Petitioners' competitors in the promulgation of the 1994 Standard.

The Second Circuit ruling is not, as Petitioners suggest, an aberration and travesty that will permit anti-competitive behavior to go unchecked. Rather, it is the proper application of a basic threshold principle of antitrust law in dismissing a meritless lawsuit, and the rejection of the grossly misguided assertion that every product standard is the result of an illegal conspiracy. (Pet. at 15) The case raises no significant issue of antitrust law that warrants this Court's review.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: November 13, 2000

APPENDIX

APPENDIX — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED APRIL 18, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999
(Argued: April 11, 2000 Decided: April 18, 2000)
Docket No. 99-9111

H. PRICE JESSUP, LINDA VAUGHN, SALLY A. KELLY, SUSAN OWENS, ANNETTE WATKINS and NANCY HOPE LOVE,

Plaintiffs-Appellants,

— v. —

THE AMERICAN KENNEL CLUB, INC.
and LABRADOR RETRIEVER CLUB, INC.,

Defendants-Appellees.

Before:

NEWMAN, KEARSE, and KATZMANN,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Thomas P. Griesa, then-*Chief Judge*, dismissing antitrust complaint

alleging that defendants' setting of height standards for championship Labrador Retrievers violated the Sherman Act, 15 U.S.C. §§ 1 and 2.

Affirmed.

* * *

Per Curiam:

The judgment is affirmed substantially for the reasons stated in then-Chief Judge Griesa's opinion reported at 61 F.Supp.2d 5 (S.D.N.Y. 1999).